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January 9, 2006

VIA E-MAIL AND E-FILING

Victoria J. Rutson, Esquire
Chief, Section of Environmental Analysis
Surface Transportation Board
1925 K Street, N.W., Room 504
Washington, DC 20423-0001

Re: STB Finance Docket No. 34795

*Roquette America, Inc. - Petition for Exemption from 49 U.S.C. §10901 to
Construct a New Line of Rail in Keokuk, IA*

Dear Ms. Rutson:

This letter responds to your letter of December 21, 2005. While Keokuk Junction Railway Co. ("KJRY") understands the positions stated in the letter and agrees with some of your points, there are other areas where we must continue to disagree.

Background

Inasmuch as Roquette America, Inc. ("Roquette") has had multiple meetings, conversations, and correspondence with the Section of Environmental Analysis ("SEA") explaining its position, let me begin by briefly summarizing this case from KJRY's point of view. KJRY has served Roquette's Keokuk, IA plant for many years. For approximately the past nine and one-half years, KJRY has operated under a contract with Roquette as a switch carrier. That agreement has provided Roquette with "open switching," in other words, competitive access to two carriers, exactly the type of competitive access that shippers have been requesting Congress to legislate or the Board to impose. That contract is coming to an end. In good faith, KJRY had been attempting since last spring to renegotiate it, but has gotten no substantive response to its efforts.

Due to the fact that Roquette is an "open" industry, *i.e.* open to switching to two carriers for the line haul moves, Roquette has had the choice to route its traffic via BNSF Railway Company ("BNSF") in a direct single-line move or via KJRY-Union Pacific in a joint line move. In recent years, Roquette has mainly chosen BNSF. Indeed, KJRY has switched well over 90% of Roquette's outbound traffic to BNSF in the past five years.

BAKER & MILLER PLLC

January 9, 2006

Page 2

This open switching arrangement has worked extremely well over the years. Thus, it was a great surprise to KJRY when, in late November, it learned for the first time that Roquette had been working with SEA since June to obtain approval of a plan that, in KJRY's view, seeks to allow Roquette to use KJRY's tracks, including the Hub Track, without KJRY's permission and without adequate compensation. Apparently, the plan is to give BNSF direct physical access to the plant, effectively cutting KJRY out of serving Roquette. As stated in Roquette's letter to you dated July 6, "The primary effect of the construction and operation of the line and the crossing would, depending upon the competitive response of both KJR and BNSF, be to possibly eliminate KRJ [sic] as the origin switch carrier for the movements." Roquette is an extremely important customer for KJRY. In some ways, due to the size of Roquette vis-à-vis KJRY it is KJRY that is "captive" to Roquette, not the other way around.

While it was discussing the various environmental issues with SEA to develop its proposal, Roquette was telling KJRY that its intentions were entirely different. In fact, earlier this year, Roquette began seeking 'clarification' from KJRY about who owned the Hub Track. Eric Tibbetts of Roquette, who met with Board staff on June 20, told KJRY's CFO Mike Carr ten days after the STB meeting that "the ownership of the Hub Track has nothing to do with the question of BNSF access. Although I have not thought about it until you brought it up, I do not see any connection between the two." (See Exhibit 1 hereto.) Rather, he suggested, Roquette wanted to install a car washing facility on the Hub Track. We now know that Roquette's use of the Hub Track is entirely related to the planned rail construction project and is an integral part of it.

Not all of the foregoing is directly relevant to the environmental portion of this case. However, I wanted to set out that background to make more apparent to you why it is that KJRY was alarmed to find at the end of November - when KJRY first learned of Roquette's exemption petition - that Roquette had been working behind the scenes for months with Board staff, and why KJRY was even more alarmed to find that the Board's third-party environmental contractor on this project was a company that was simultaneously working for and seeking additional work from Roquette at the Keokuk plant. With this in mind, I now turn to KJRY's areas of continuing disagreement with some of your letter.

Potential Conflict of Interest

Your letter acknowledges that the third party contractor the Board has hired to draft the environmental analysis in this matter, Burns & McDonnell Engineering Company, Inc. ("B&M"), was selected while B&M was engaged to work for Roquette on a cogeneration project at the very same facility that is the subject of the proposed rail construction project. Your letter asserts, however, that the cogeneration project is unrelated to the transportation question in this proceeding, and that implementation of a "firewall" between B&M staff working on that project and the company's staff working on environmental analysis for the Board will "effectively prevent any potential conflict of interest and ensure[] compliance with 40 CFR 1506.5(c)."

BAKER & MILLER PLLC

January 9, 2006

Page 3

Due to information now uncovered during the discovery process, KJRY believes that B&M's engagements with Roquette constituted "an interest in the outcome of the project" within the scope of 40 CFR §1506.5(c); thereby making the Board's reliance upon a screening mechanism improper, at least in the context of this case. CEQ regulations permit a federal agency to retain a third party consultant to prepare an environmental impact statement only where the consultant can certify that it has no "financial or other interest in the outcome of the project." 40 CFR §1506.5(c). That common-sense limitation is "designed ... to minimize the conflict of interest inherent in the situation of those outside the government coming to the government for money, leases or permits while attempting impartially to analyze the environmental consequences of their getting it." 43 Fed. Reg. 55,987 (1978). As CEQ has explained, avoidance of situations in which a contractor has an interest in the outcome of a project is important for two reasons: it "ensure[s] a better and more defensible statement for the federal agencies," and, more importantly, it "serves to assure the public that the analysis in the environmental impact statement has been prepared free of subjective, self-serving research and analysis." CEQ, Guidance Regarding NEPA Regulations, 48 Fed. Reg. 34,263, 34,266 (1983).¹

KJRY submits that B&M does have a direct financial interest in the outcome of this case, notwithstanding the use of a screening mechanism. It is unclear from the materials that have been provided to you (and now to us) that the cogeneration project is in fact unrelated to the proposed rail build-out project. They may in fact be inextricably linked. At the very least, they both purport to have a financial impact on the same plant, one allegedly cutting expenses and the other involving capital expenditure. It is not hard to imagine that the two are linked economically and indeed, some documents produced in discovery appear to link the projects.²

Indeed, the contractor's interest in this case is even more stark and unavoidable than the examples of disqualifying interests provided by CEQ's guidance.³ For example, not only was B&M working for Roquette at the time B&M's vice president certified, "On behalf of [B&M], I certify that I have no financial or other interests" in Roquette's track construction, but B&M was

¹ In accordance with 40 CFR §1506.5(c)'s prudential purpose, CEQ interprets the phrase "financial or other interest in the outcome of the project" broadly to cover "any known benefits other than general enhancement of professional reputation." CEQ, 40 Most Asked Questions, *supra*. Disqualifying interests include "any financial benefit such as a promise of future construction or design work on the project, as well as indirect benefits the consultant is aware of (e.g., if the project would aid proposals sponsored by the firm's other clients)." *Id.*

² It is also unknown whether or not B&M has a financial relationship with BNSF. If it does, this could also represent a financial interest in the outcome of the proceeding in conflict with CEQ guidelines.

³ See Council on Env'tl Quality, 40 Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18,026, 18,031 (Mar. 23, 1981)

BAKER & MILLER PLLC

January 9, 2006

Page 4

also apparently seeking further contracts from Roquette. Roquette's discovery responses thus far include a September 21 e-mail from another B&M employee to Mr. Thornhill, B&M's lead on this project. That e-mail states, "This ["Roquette/Confidentiality Agreement/B&M"] is ok ... you may want to change the wording .. we haven't actually been awarded any work yet .. maybe it should say potentially involved in the boiler project." ROQ00035 (Exhibit 2 hereto.)⁴ Similarly, a July 25 e-mail from Roquette's Mr. Tibbetts to B&M and others, also produced in discovery (ROQ00092 - Exhibit 3 hereto) says the following: "As of my conversation this morning, I understand the B&M work has been COMPLETED. Any additional work will ONLY come from another bid process. My suggestion is that we complete this 'firewall' process with the STB's blessing; thus we can insure that any future contracts with B&M will not run afoul of current STB guidelines." It is sufficient to note at this juncture that Mr. Tibbetts was, by this e-mail, holding out to B&M the prospect of future business with Roquette. Again, CEQ's 40 Most Asked Questions, *supra*, specifically mentions promises of future employment as a disqualifying interest.

Given B&M's improper interest in maintaining and expanding its employment relationship with Roquette and the possibility that the cogeneration project may be linked to the rail construction project, we believe SEA should move to disqualify B&M and select another third party contractor. CEQ has made clear that a consultant with an improper interest in a project "should be disqualified from preparing the EIS." CEQ, 40 Most Asked Questions, *supra*. The CEQ regulations do not authorize federal agencies to rely upon screening mechanisms, such as the "firewall" the Board relies upon here, where a consultant in fact has a disqualifying interest in the project, which we would argue B&M has here.⁵

Under these circumstances, we believe that SEA should take immediate steps to disqualify and terminate B&M as its consultant in this project. Continued reliance upon B&M as an alleged neutral and impartial third party contractor will only jeopardize the integrity and

⁴ This also, by the way, indicates that B&M apparently was still, in late September, dickering with the language to be used in the confidentiality agreement and that no actual firewall agreement had been signed at that time. Yet, this occurred more than two months after B&M conducted the site visit and over a month after B&M's August 11 memo to the Board summarizing the results of that visit.

⁵ In addition to the concerns already expressed, KJRY submits that the effectiveness of the 'firewall' has already been compromised. Roquette's discovery responses reveal that B&M's site visit, on which it based its August 11 report to the Board, was conducted July 11, long before the firewall provision B&M planned was even submitted to the Board, but while the cogeneration project was going on. Moreover, as noted above, B&M apparently was still working on the internal agreements to implement the firewall long into September, when the environmental process was well underway. Finally, it appears from B&M's August 11 letter to the Board describing the firewall that the firewall would terminate when B&M concluded its work on the cogeneration contract, which Roquette's discovery responses state occurred in July or August. Thus, it may be that the supposed firewall was never in fact actually implemented.

BAKER & MILLER PLLC

January 9, 2006

Page 5

defensibility of the Board's environmental analysis and undermine the public's faith in the NEPA process. Certainly there are cases where firewalls are sufficient, but this is not one of them.

Public Participation

Your letter states that KJRY's "assertion that the environmental process has been carried out 'in secret' for months is both misleading and unfair." You then point to the fact that in the future, there will be opportunity for comment on environmental issues. Certainly KJRY will have further opportunity to comment on the environmental process in this proceeding, but what may occur in the future does not change what has happened in the past. Between June and November, the environmental review process in this matter moved many steps along the road to completion with only Roquette's input and without any documents being placed in the public file or even in SEA's environmental correspondence file. In fact, there were no such documents placed into the public record until after the Petition for Exemption was filed on November 29th, and even those were not available on the Board's website until Dec. 6th. So in fact, there was no public disclosure for five or six months. While this may be standard practice in Board rail construction cases, it was not misleading or unfair to call the process "secret" as in fact there was no public disclosure of the project from June until November.

This undisclosed work led, in KJRY's view, to solicitation of environmental comments based on incorrect or slanted information. For example, the environmental consultation letter distributed on November 3 states:

Currently the corn processing facility receives rail service exclusively from the Keokuk Junction Railway. . . . [T]he proposed rail line would provide Roquette with competitive rail service.

In fact, as previously noted, KJRY has switched over 90% of Roquette's outbound traffic to BNSF at a rate effectively the same as the switching rate that the Board found in UP/SP would assure 2-to-1 shippers "meaningful access" to BNSF. In short, Roquette already has competitive rail service. Had the public, including KJRY, been provided notice of the ongoing environmental process at any time during the June to November time period, B&M's consulting letters could have been more accurate in this respect and accordingly any comments received would have been responsive to the actual facts of the proceeding.

It is also important to note that Roquette had a deliberate strategy to keep this project secret and to limit public input. Another of Roquette's discovery responses - ROQ00132-00133, an e-mail from Mr. Tibbetts discussing the June 20 meeting with SEA staff (Exhibit 4) - is revealing in this regard. It says in pertinent part, "The next step would be for B&M to prepare 'Consultation Letters'. . . . At this point, the Project will definitely be public knowledge. We can work with the STB to keep it confidential until then, but normally public disclosure occurs earlier in the process." (Emphasis added.) From this, KJRY believes it is clear that Roquette sought to enlist the Board in preventing public knowledge of the project for an unusually long

BAKER & MILLER PLLC

January 9, 2006

Page 6

time, and that Roquette intended that secrecy to advantage Roquette. In the end, KJRY finds the secrecy of Roquette's work with the Board from June to November disturbing because that secrecy facilitated Roquette's efforts to mislead KJRY about the reasons for its efforts to obtain control of the Hub Track, explains Roquette's failure to respond substantively to KJRY's contract offers, and led to inaccurate assertions in the environmental consulting letters.

Environmental Report/Availability of Documents

Finally, as a matter of clarification, I was not aware when I prepared my December 6th letter that the Board had approved B&M as a third-party contractor. I understand the fact that your staff provided my administrative assistant with certain documents at the end of the day on December 5, a fact that I appreciate, and that those documents reflected B&M's retention. However, my assistant picked up those documents on her way home for the evening and they were not delivered to Mr. Reeves until the next morning. I was not able to review those documents prior to preparation of the December 6 letter. If I had been able to review them before that letter was filed, I doubtless would have approached that letter differently. I apologize for the fact that those documents were not factored into the December 6 letter.

Sincerely,



William A. Mullins

cc: Vernon A. Williams
Daniel A. LaKemper
Nicholas J. DiMichael, Esq.
Jeffrey O. Moreno, Esq.
Steve Thornhill, Burns & McDonnell

EXHIBIT 1

Subj: RE: Hub Track
Date: 7/1/2005 12:34:40 PM Central Daylight Time
From: ERIC.TIBBETTS@roquette.com
To: JM1Carr@aol.com
CC: FLINT.PEYTON@roquette.com, ERIC.TIBBETTS@roquette.com

Mike,

Roquette's interest in gaining a clear understanding of the ownership of the Hub Track has nothing to do with the question of BNSF access. Although I have not thought about it until you brought it up, I do not see any connection between the two.

Our interest in the Hub track relates to issues such as a unified on-site tank car wash facility, a steaming station to steam cars with solid heels in them prior to a wash rack, the possibility of a run around track to enhance the flow of cars in the Plant and/or a site to steam inbound raw material cars (our current 3 spots gets overwhelmed with very slow turnaround on sulfur cars). In each case, the track is a necessary ingredient to a further infrastructure investment by Roquette. I do not believe Roquette (or KJRY) would make a capital investment, if that investment is based on a piece of leased track.

Your note, as you quoted below, suggested in the phrase " Absent evidence to the contrary provided by Roquette" that Roquette needed to provide documentary proof to KJRY of our ownership. Simply stated, I have done just that. The Agreement between our Companies clearly indicates Roquette (Hubinger) ownership in November, 1977. I have no documentation that suggests an ownership change since that date, but I am willing to admit that such a document might exist. I am asking if KJRY can help me understand events that may have occurred since that time that would have reversed the stated intent of that Agreement.

Mike, I hope this clarifies Roquette's interest in the Hub Track. From my perspective, it has everything to do with inside-the-Plant efficient and nothing to do with the Switching agreement. This is a situation that has passed from year-to-year with each side believing something different as to ownership. I am simply trying to get to the documented facts, and resolve the issue for all parties.

I hope you and your family have a terrific Holiday week-end.

-----Original Message-----

From: JM1Carr@aol.com [mailto:JM1Carr@aol.com]
Sent: Friday, July 01, 2005 11:35 AM
To: TIBBETTS Eric
Cc: PEYTON Flint
Subject: Hub Track

Eric,

In regards to your inquiry about the Hub track and your recent email comment concerning "regaining access to the BNSF". Roquette has always, and continues, to have access to its line haul carrier via its switch operator, KJRY. If you are asking us to allow the BNSF or any other railroad to go over our property to switch your plant we will not allow that to happen. If your interest in the Hub track relates to this type of activity you need to redirect your attention to renewing the switch contract. Repeating prior correspondence "Absent evidence to the contrary provided by Roquette, it is our position that this track is owned by KJRY and has been operated as such for as long as anyone can remember. If it is critical to Roquette operations to utilize this track, we would be willing to enter into a lease agreement with Roquette to use this track, so long as there is no adverse financial impact on KJRY." We would lease this track to Roquette long term for a small nominal fee.

I will try to get back to your other concerns within the next couple weeks.

Friday, July 01, 2005 America Online: JM1Carr

EXHIBIT 2

DePew, Aimee

From: Thornhill, Steve [sthornh@burnsmcd.com]
Sent: Tuesday, September 27, 2005 10:51 AM
To: DiMichael, Nicholas
Subject: FW: #171038 v1 - Roquette/Confidentiality agreement/B&M

Nick - see attached from our Energy group coordinator for Roquette. Looks like things are acceptable on our end.

Sorry I didn't get back sooner, last week was crazy.

Hope things are going well.

Let me know if you have any other questions.

Steve

From: Halil, Rick
Sent: Wednesday, September 21, 2005 4:25 PM
To: Thornhill, Steve
Subject: RE: #171038 v1 - Roquette/Confidentiality agreement/B&M

This is ok ... you may want to change the wording .. we haven't actually been awarded any work yet .. maybe it should say potentially involved in boiler project.



Manager, Development Engineering
816-822-3544 (ph)
816-803-9305 (cell)
rhalil@burnsmcd.com

From: Thornhill, Steve
Sent: Wednesday, September 21, 2005 9:29 AM
To: Halil, Rick
Subject: FW: #171038 v1 - Roquette/Confidentiality agreement/B&M

Rick - please see attached, let me know if you have any revisions or suggestions.

Thanks for your help!

Steve

From: DiMichael, Nicholas [mailto:Nicholas.DiMichael@thompsonhine.com]
Sent: Thursday, September 01, 2005 1:52 PM
To: Thornhill, Steve
Cc: eric.tibbetts@roquette.com
Subject: #171038 v1 - Roquette/Confidentiality agreement/B&M

Steve:

Per the "firewall" letters to and from the STB, we need to have a short confidentiality agreement for the environmental review and

12/20/2005

ROQ00035

DePew, Aimee

From: DiMichael, Nicholas
 Sent: Thursday, August 04, 2005 3:36 PM
 To: 'TIBBETTS Eric'; Thornhill, Steve
 Cc: elindquist@foxlex.com; PEYTON Flint; DUNEK Bruce
 Subject: RE: Roquette - Firewall

Eric:

I have heard from Steve Thornhill on this matter, and will revise the letter as you suggest below (and as Steve suggests in his email) (and see my separate email replying to Steve's question), and send the draft on to Christa Dean, on an informal basis. If she tells me that this "does the trick," I will have Steve send me his letter ASAP, and I will send my letter to Christa in final form when I receive the MOU signed by Roquette and B&M.

Nick

-----Original Message-----

From: TIBBETTS Eric [mailto:ERIC.TIBBETTS@roquette.com]
 Sent: Monday, July 25, 2005 11:01 AM
 To: DiMichael, Nicholas; Thornhill, Steve
 Cc: elindquist@foxlex.com; PEYTON Flint; DUNEK Bruce
 Subject: RE: Roquette - Firewall

Nick,

I have read the documents below, and given my level of understanding, have two comments.

- In the second paragraph, line three I would change the word "pursuing" to "investigating". At this time, Roquette is evaluating design concepts for a project that does not yet have Board approval. I believe this change more clearly recognizes the current state of affairs.

- In the third paragraph, line four, there is a typo. The phrase should be "as long as possible".

One other comment--which will probably confuse more than help. As of my conversation this morning, I understand the B & M work has been COMPLETED. Any additional work will ONLY come from another bid process. My suggestion is that we complete this "firewall" process with the STB's blessing; thus we can insure that any future contracts with B & M will not run afoul of current STB guidelines.

-----Original Message-----

From: DiMichael, Nicholas [mailto:Nicholas.DiMichael@thompsonhine.com]
 Sent: Sunday, July 24, 2005 1:48 PM
 To: TIBBETTS Eric; Thornhill, Steve
 Cc: elindquist@foxlex.com; PEYTON Flint
 Subject: Roquette - Firewall

Eric, Steve:

In order to implement the STB's requirement for a "firewall," I have prepared a letter for B&M, to be sent to me, describing the proposed firewall, as well as a letter from me to the STB, attaching the proposed letter from B&M. Please take a look at these drafts, and let me know if they correctly describe the current situation and whether the proposed firewall is acceptable.

If these are OK, I will send them informally to Christa Dean, so that she can tell us informally whether any changes are needed. If there are no changes, then I would send the letters to the STB at the same time that we send the MOU for signature, so that everything can be executed at the same time.

DePew, Aimee

From: TIBBETTS Eric [ERIC.TIBBETTS@roquette.com]
Sent: Tuesday, June 21, 2005 5:29 PM
To: DiMichael, Nicholas
Cc: PEYTON Flint; TIBBETTS Eric; Eric Lindquist (E-mail); Steve Thornhill (E-mail)
Subject: Visit to STB

This note will summarize the activities covered and the action developed during my visit to Washington DC on Monday, June 21st.

I met with Nick at his office and reviewed the Agenda he had developed, and modified my talking points for the STB. The Agenda covered description of RAI business; RAI rail situation; possible build-out scenarios; and the appropriate spots to discuss the specific items the STB will require.

The first meeting was with Vicky Rutson, Chief of the Section on Environmental Analysis and Christa (spelling ?) Dean, of her staff who will be handling our filing. We spent over an hour walking through the Agenda and answering their questions. Next steps are:

- 1) Normally, the STB requires a six months Advance notice before any filings are made. We must file for a waiver of that requirement, as we will need to move much faster. Vicky indicated that we should be granted the waiver.
- 2) Thompson Hine (T/H) will prepare the letter of engagement for Burns McDonnell. The standard practice is for the applicant (Roquette) to contract with an environmental company, but that the firm take all of its guidance from the STB. Christa will give us an example of such a document that the STB prefers.
- 3) T/H will prepare a Memorandum of Understanding (MOU) between Roquette, STB and Burns and Mc Donnell. This document sets out the roles and responsibilities of each party in the development of an Environmental study to satisfy the STB regulations for a project approval. The STB, through our chosen contractor (Burns & McDonnell), will do an assessment of the environmental impact of our proposed build out/crossing. Their assessment will play a critical role in keeping this to an Environmental Assessment (EA) rather than an Environmental Impact Statement (EIS). Christa will provide example documents to T/H.
- 4) The next step would be for B&M to prepare "Consultation Letters". This would describe the project, and would be sent to all possible stakeholders. This would include state and local environmental Agencies, Federal Agencies (fish & wildlife), Corps of Engineers and many civilian environmental groups. At this point, the Project will definitely be public knowledge. We can work with the STB to keep it confidential until then, but normally public disclosure occurs earlier in the process.
- 5) The STB Environmental group will conduct a public site investigation. This may even include a public hearing, conducted by STB and B&M.
- 6) At this point, RAI will request a waiver of the requirement for an EIS. This document will include all of the information surrounding our chosen alternative (s), and even include any voluntary mitigation projects that RAI might elect to offer.

We then visited briefly with the Office of Proceedings--Dave Konschnik, Director and Joe Dettmar, Deputy Director. We briefly repeated our earlier discussion. In this situation, we were meeting with the folks that will actually be reviewing the docket and providing analysis to the Commissioners. They listened, and asked a few clarifying questions, but refrained from providing any thoughts or guidance, given their role as eventual arbiters of this issue.

Nick and I then reconvened back at his office. We called Steve Thornhill of B&M, and updated him on the discussion. We then spent some time identifying other action items to be addressed. In addition to those required by the STB Environmental group listed above, we added:

- 7) We need to work with Art Cole to develop our preferred design in the next 30 days.
- 8) Eric (and Flint) need to meet with the BNSF to update them.
- 9) Eric needs to send copies of RAI/KJ contract discussions to Nick.
- 10) Eric, Steve & Nick to talk on Thursday, June 30th @ 2:00 EST.

Nick, please correct or amend as appropriate. thanks

Eric Tibbetts
Manager, Logistics
Roquette America, Inc
800-222-5757 Ext 2387
319-526-2387 office
319-795-0154 cell
eric.tibbetts@roquette.com

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